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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RAMON AZURIN and GREGORIO ARANETA,
Petitioners,

v.

WILLIAM VON RAAB, Commissioner of Customs of the United States Customs Service,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the United States Customs Service may detain the property of a distinguished foreign visitor pending determination of ownership of said property, where the Customs Service has conceded that no grounds exist to seize the property for lawful forfeiture, payment of duties, or investigation of violations of U.S. law, and where all administrative requirements have been met.

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RAMON AZURIN and GREGORIO ARANETA,
Petitioners,

v.

WILLIAM VON RAAB, Commissioner of Customs of the United States Customs Service,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully request that writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit, entered on October 29, 1986, which reversed a writ of mandamus issued by the United States District Court for the District of Hawaii ordering respondent to return to petitioners' possession property detained by the United States Customs Service.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 803 F.2d 993 and contained in the Appendix at 1a.[1] The opinion of the District Court is reported at 632 F. Supp. 30. (14a).

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[1] References to the Appendix are cited herein as "—a."

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1986. A timely petition for rehearing and rehearing en banc was denied on January 6, 1987. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The case involves 19 U.S.C. §§ 1483, 1484(a)(2)(C) and 1490, and 19 C.F.R. §§ 101.1(k)(1) and 141.12, which are fully set forth in the Appendix. (52-54a).

STATEMENT

This case concerns the authority of the United States Customs Service to detain property, brought into the country by the U.S. Government, on the basis of a claim of ownership by a third party.

On February 25, 1986 representatives of the U.S. military induced Ferdinand E. Marcos, President of the Republic of the Philippines, to depart Malacanang Palace, his official residence in Manila, by promising to transport him, along with members of his staff, including petitioners, and property belonging to the group to Ilocos Norte, a northern province of the Philippines. Instead of taking President Marcos and his party to Ilocos Norte, however, the U.S. military transported them, along with their property, to Guam and later to Hawaii, where they arrived on February 26 (54a).[2]

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[2] In a letter dated the same day, Donald Regan, Chief of Staff to the President of the United States, advised the Honorable James Baker, III, Secretary of the Treasury, that the President had designated President Marcos as a distinguished foreign visitor, and, accordingly, directed that Secret Service protection be provided for President Marcos for 30 days. (32-33a). 19 CFR 148.82(b) states:

> The baggage and effects of the following representatives of foreign governments shall be admitted free of duty without the filing of an entry, upon the request of the Department of State

Later in the day of February 26, representatives of the U.S. Customs Service began, without the approval of any members of the Marcos party, an examination of the property aboard a military transport plane flown from Manila to Hawaii. Several days later, the Customs Service commenced a formal inspection of the property, which included 22 crates of Philippine currency valued at over $1 million and jewelry valued by the Customs Service at over $4 million. In response to demands by the Customs Service, petitioners submitted, as attorneys-in-fact for President Marcos and his party, designated Customs forms, which the Customs Service accepted without objection. (15-16a).

The Customs Service completed its examination of the property in question on March 11, 1986. Nevertheless, it refused to return the property to petitioners' possession because of an adverse claim of ownership advanced by the new Philippine Government through diplomatic channels. (15a).[3] On March 13, 1986, petitioners filed a

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and appropriate instructions from the United States Customs Service in each instance:

. . .

(4) Other high officials of foreign governments and such distinguished foreign visitors as may be designated by the Department of State, and their immediate families.

[3] On February 28, 1986, the Philippine Government, through its Central Bank, filed an action against President Marcos, petitioners, and the district director of the Customs Service seeking return of the Philippine currency or an award for its monetary equivalent. The suit alleged both misappropriation of the currency and violations of Philippine export regulations. Several weeks later, the Philippines filed a second suit seeking return of the same currency as well as all jewelry containing gold. On October 22, 1986, the Philippines amended its suits to drop all allegations regarding misappropriation of the property, and with those amendments, eliminated all claims of ownership to the property from those suits. The U.S. Government, a defendant in the second Central Bank action, moved on April 9, 1986 to interplead the contested property. As discussed *infra*, the District Court denied this motion on October 27, 1986 (42a).

mandamus action in the District Court, pursuant to 28 U.S.C. § 1361, against respondent, the Commissioner of Customs, to force the release of the detained property.

The District Court issued a writ of mandamus on June 6, 1986. (12-13a). In the memorandum accompanying the writ (14a), the District Court, after discussing at length the authority relied upon by respondent and the 200-year practice of the Customs Service, stated that the Customs Service did not have the authority under Title 19 of the U.S. Code to detain the property in question. (24-31a). The District Court pointed out that the Customs Service deliberately had eschewed seizing the property pursuant to its authority under 19 U.S.C. § 482, as the agency disclaimed any investigation of violations of U.S. law or non-payment of applicable duties. (23-24a).[4] The District Court rejected respondent's assertion that he enjoys the discretion under the relevant statutes to "detain goods until such time as an importer proves legal ownership of the goods," and accordingly held that in the absence of a legal right to detain the property, respondent owed a clear, ministerial duty to return it to petitioners' possession (33-35a).

Respondent moved for a stay of the mandate until an appeal could be filed with the Court of Appeals, but the District Court, after considering the new evidence offered by respondent, denied the motion. (36-41a). The Court of Appeals issued a stay of the writ on June 23, 1986. (48-49a).

On appeal, the Court of Appeals refused to consider whether the Customs Service has the authority to detain property pending proof of ownership. (4a). Instead, the Court of Appeals held that ownership was not clearly irrelevant to the Customs Service's performance of its statutory duties and that Title 19 did not impose an

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[4] The District Court acknowledged that petitioners had represented that they would pay all outstanding duties (33a).

explicit duty on respondent to return the property to petitioners' possession. (5a). The Court of Appeals, while recognizing that the Customs Service has the right to ignore considerations of ownership of property passing through its jurisdiction, found that no statute or regulation prohibited the Customs Service from insisting upon proof of ownership before releasing property from its custody. (5a). The Court of Appeals therefore concluded that petitioners did not meet one of the essential requirements for issuance of a writ of mandamus, namely, showing a ministerial duty owed them by respondent. (7a).[5]

The Court of Appeals also declined to address the propriety of the reason advanced by the Customs Service for its detention of the property. In its briefs filed both with the District Court and the Court of Appeals, the Customs Service represented that it had detained the property in question solely for the limited purpose of placing it in interpleader to resolve ownership. The Court of Appeals refused to consider, on the grounds that the issue was unripe, petitioners' argument that interpleader was unavailable to the Customs Service. Moreover, after the District Court had denied the U.S. Government's motion for interpleader of the disputed

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[5] The Court of Appeals did not consider whether petitioners met the other two requirements for mandamus relief. (11a). *See Fallini v. Hodel*, 783 F.2d 1343 (9th Cir. 1986). Respondent, however, did not challenge that petitioners met the first requirement for issuance of a writ of mandamus, i.e., that their claim is clear and certain. Respondent's earlier contention that petitioners had an adequate legal remedy in the interpleader action he initiated has been mooted by the dismissal of the interpleader. In addition, petitioners are unable to pursue a remedy in the Claims Court. 28 U.S.C. § 2503 permits an alien to sue the United States in Claims Court only if a U.S. citizen may sue the alien's home country in its courts. U.S. citizens apparently are prohibited from bringing suit against the Philippine Government in Philippine courts. *See United Continental Tuna Corp. v. United States*, 550 F.2d 569 (9th Cir. 1977) (suit by Philippine corporation against United States barred by lack of reciprocity).

property, in a decision issued after the Court of Appeals' reversal, (42a), the Court of Appeals denied a petition for rehearing to consider whether the elimination of the Customs Service's proffered justification for detaining the property compelled a different result. (50a).

REASONS FOR GRANTING THE PETITION

1. This case presents a fundamental policy question regarding the power of the U.S. Customs Service to detain property crossing the U.S. borders. Despite respondent's repeated characterization of this action as unique, the ramifications of a judicial approval of detention of goods under the guise of resolving the ownership of the goods are profound. Under the authority of this case the Customs Service now enjoys the unfettered discretion to detain indefinitely any property entering the United States, regardless of whether such entry was intended, provided the Customs Service can claim that a dispute over the ownership of the property exists. It is, thus, irrelevant that petitioners met all administrative requirements for entry of the goods and that the Customs Service concededly conducted no seizure or exclusion of the property at issue. This virtual carte blanche to the Customs Service to detain property for no reason other than a disputed claim of ownership threatens to disrupt the elaborate, yet predictable mechanism for enforcement of the Customs laws. The efficient flow of commerce across U.S. borders, the primary goal of the Customs Service, depends on the application of clear and well-defined criteria. This contrasts with the regulation of immigration, an inherently more subjective process involving a wider spectrum of policy goals, which the Immigration and Naturalization Service administers under broad statutory grants of discretion. *See e.g.*, 8 U.S.C. §§ 1156, 1181(b), 1183 and 1184(a); *Olegario v. United States*, 629 F.2d 204 (2d Cir. 1980). Equally important, the power conferred upon the Customs Service to detain

property can be exercised in such a manner as to infringe the Fourth Amendment and due process rights of every person who traverses or transports property across U.S. borders.

2. The decision of the Court of Appeals reversing the District Court's issuance of a writ of mandamus has created a conflict between the Courts of Appeals for the Ninth and Second Circuits regarding the authority of the U.S. Customs Service to detain property for the purpose of determining ownership. In *Fonseca v. Regan*, 734 F.2d 944 (2d Cir.), *cert. denied*, 469 U.S. 882 (1984), the Second Circuit held that the Customs Service did not have the authority to hold currency mistakenly delivered to New York by an airline carrier merely because a foreign government had made claims of ownership to the currency on the basis of suspected violations of foreign law. In a situation virtually identical to the present one, the Customs Service detained property involuntarily entered into the United States, and initiated legal processes to determine the true owner of the property, even though no violations of U.S. law were apparent so as to justify a seizure of the property. The Second Circuit, citing *Dunbar v. United States*, 502 F.2d 506 (5th Cir. 1974), held that the interrogatories the Customs Service presented to plaintiff to investigate plaintiff's acquisition of the currency "might have interesting answers," but they were irrelevant to the issue of the right to possession. 734 F.2d at 950.

The Second Circuit held that, because only the right to possession was relevant to the statutory scheme of the Customs Service, any discovery regarding the legitimacy of plaintiff's ownership of the currency was improper. 734 F.2d at 949. The Second Circuit pointed out that plaintiff had demonstrated a right to lawful possession of the property by presentation of a baggage claim ticket and by filing the appropriate Customs forms. *Id.* Accordingly, the Second Circuit, concerned over the Cus-

toms Service's abuse of its authority, found the district court's dismissal of plaintiff's mandamus action for failure to answer the Customs Service's interrogatories to be erroneous and dismissed the Customs Service's interpleader action. 734 F.2d at 950.

In this instance, the Court of Appeals for the Ninth Circuit implicitly rejected the holding of *Fonseca* by holding that ownership possibly is relevant to the statutory scheme of the Customs Service. The Court of Appeals pointed out that 19 U.S.C. § 1484(a)(2)(C), which provides for the entry of merchandise, requires all entry documentation to be filed by the "owner or purchaser." Though the terms "owner" or "purchaser" are never defined in the applicable statutes and regulations, and in spite of the District Court's analysis that the "owner" of goods is essentially any party entering merchandise into the United States who is willing to acknowledge responsibility for applicable duties (28a), the Court of Appeals held nevertheless that the terms, when considered in light of the provision in the same statute which permits the Customs Service to accept, without liability, a declaration of ownership, show that ownership "may" be relevant for purposes of entry. (5a).

The Court of Appeals further misconstrued the scope of 19 C.F.R. § 141.12, which provides that "[w]hen merchandise is not imported by a common carrier, possession of the merchandise at the time of arrival in the United States shall be deemed sufficient evidence of the right to make entry," by insisting, *inter alia*, that the regulation only provides the right to submit entry documentation, which the Customs Service is free to reject. (7a). The Court of Appeals ignored the more logical interpretation of the regulation, i.e., a person entering goods into the country need only show possession of the goods to make entry, and, conversely, that the Customs Service is prohibited from inquiring beyond the identity of the person possessing the merchandise upon entry. The Court

of Appeals also failed to consider that in fact the Customs Service did not reject the entry documentation submitted by petitioners. (30a).

Instead of recognizing the conflict between its decision and *Fonseca*, the Court of Appeals sought to distinguish *Fonseca*, initially by asserting that the plaintiff in that action never intended to enter the lost baggage into the United States. (9a). The Court of Appeals failed to realize, however, that, like the plaintiff in *Fonseca*, neither petitioners nor President Marcos intended to bring the property to the United States. In denying petitioners' motion for rehearing, the Court of Appeals ignored the fact that respondent did not challenge President Marcos' declaration that he and his party, along with the property in question, were brought involuntarily into the United States.[6] Perhaps more importantly, the Court of Appeals failed to consider that the transportation of the property to the United States did not result from an airline error, but rather from the affirmative conduct of the U.S. Government.

The Court of Appeals further contended that *Fonseca* involved the common law ground that the holder of a baggage claim check ordinarily is entitled to the return of the checked baggage. (9a). While the Second Circuit

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[6] At least one other court has held that the intent to enter property into the United States is relevant to the Customs Service's jurisdiction over the property. In *United States v. Eighty-Five Head of Cattle*, 205 F. 679 (D. Mont. 1913), the United States initiated a forfeiture proceeding to collect duties on several cattle that had wandered across the border from Canada. The court held that for property to be imported into the United States, "it must be of foreign situs, and brought hither by the owner, or with his consent, with intent to be here held . . ." 205 F. at 681. Though the cattle owner knew that the cattle could traverse the border, the court found that his failure to do everything possible to prevent the crossing did not rise to the level of a willful act or omission; therefore, the court held that the cattle were not imported, not dutiable, and not forfeited. *Id.*

in *Fonseca* discussed common law principles regarding baggage, it logically could not have reached that issue without first determining that the Customs Service was not authorized to detain the property at issue. Not only did the Court of Appeals decline to rule upon the Customs Service's authority to detain the property at issue here, it also failed to consider whether the common law principles discussed in *Fonseca* would be applicable in this case.

The final reason which the Court of Appeals gave to distinguish *Fonseca* was that the claim of the Colombian Government to the property in the hands of the Customs Service was not colorable. (10a). This reading of *Fonseca* was erroneous. The Court of Appeals was correct in stating that in *Fonseca* the Second Circuit dismissed the claims to the property by the United States and the State of New York, on the grounds that either entity would be enriched unjustly by an award of the currency. (10a). The Second Circuit recognized, however, that the Colombian Government "may have a valid action against [plaintiff] for exporting currency in violation of its currency exchange control laws." 734 F.2d at 950. Similarly, the suit filed by the Philippine Government against the Customs Service for the recovery of the property in this action is predicated solely on a violation of Philippine currency and precious metals control laws. Yet, the Second Circuit held that the Colombian Government could not use U.S. Courts to develop the facts needed to prove its case, and that it could only seek relief against plaintiff "in the appropriate forum, once the money is returned to [plaintiff]." *Id.*[7] Furthermore, as the District

[7] The Second Circuit's implicit comment that U.S. courts were not the proper forum for Colombia to seek redress for violations of its currency laws undoubtedly reflected the traditional refusal of U.S. courts to enforce the penal or revenue laws of a foreign country. Given the Ninth Circuit's reaffirmation of the same rule, it is anomalous that the Court of Appeals would give effect to a foreign currency regulation by permitting the Customs Service to detain

Court indicated, the efforts of the Executive Branch to force the Judiciary to consider the merits of the Philippine Government's claims to the property raise grave constitutional issues regarding separation of powers. (40a).

3. The Court of Appeals' decision suffers from several broader deficiencies, most notably a failure to examine necessary equitable and constitutional principles. While the Court of Appeals stated that it was not ruling on whether the Customs Service has the statutory authority to detain the property in question, it held that the relevant statutes did not clearly impose a ministerial duty on respondent to return the property to petitioners' possession. (5a).[8] The essence of the Court of Appeals'

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indefinitely property allegedly removed from the foreign country in violation of the regulation. *See Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979) (court refused to enforce Canadian tax judgment in light of traditional rule regarding foreign penal and revenue laws and lack of reciprocity).

[8] Consistent with the Court of Appeals' disinclination to address the propriety of respondent's detention of the property was its cursory discussion of 19 U.S.C. § 1490 (4-5a). The section sets forth the bases upon which the Customs Service may detain property entering the United States. Respondent contended below that although the enumerated bases for detention of property in § 1490 concern the importer's failure to pay applicable duties, to make timely entry, or to complete specified forms, the term "or other cause" contained in the statute confers broad discretion on him to detain property for the purpose of determining ownership. The Court of Appeals apparently did not consider that under the established doctrine of *ejusdem generis*, because none of the stated grounds for the detention of property by the Customs Service in § 1490 concerns in any way resolution of the ownership of the property, the term "other cause" cannot be read expansively to permit the detention of property in this case. *See diLeo v. Greenfield*, 541 F.2d 949, 954 (2d Cir. 1976) ("[W]here general terms in a statute follow an enumeration of terms with specific meaning, the general terms can be expected to apply to matters similar to those specified").

holding was that instead of the Customs Service being obligated to support its authority to detain the property in issue, petitioners were forced to point to a specific statutory provision compelling the Customs Service to return property wrongfully detained. Furthermore, the Court of Appeals' preoccupation with the standards for mandamus relief, with the attendant necessary showing of a ministerial duty, failed to consider the absence of alternate remedies available to petitioners. As the District Court pointed out, the Customs Service, by refusing either to seize or exclude the property in question, created the situation in which petitioners' only recourse was to invoke the extraordinary remedy of mandamus. (34-35a). Given these circumstances, and the role of the U.S. Government in taking the property from petitioners' possession in the Philippines, transporting it to the United States, and turning it over to the Customs Service, it is inequitable that the Government may shield itself behind the stringent standards for mandamus relief as a means of denying petitioners their possessory rights.

Even assuming the propriety of the Court of Appeals requiring a showing of a duty by the Customs Service to return the property to petitioners' possession, petitioners satisfied this burden, for the simple reason that respondent conceded the point. As the District Court emphasized, respondent admitted that "[after] Customs determines that merchandise may enter the country lawfully, and that all applicable duties have been paid, it must release the merchandise." (22a). The Court of Appeals nevertheless *sua sponte* disallowed the concession made by the Customs Service in its pleadings, without any discussion of, or briefing on, its authority to do so. Furthermore, the Court of Appeals misunderstood the rationale behind the concession. The Customs Service's position was that if the Court of Appeals found ownership to be irrelevant to the agency's performance of its statutory

duties, there would be an implied duty on the agency to return the property to the party entitled to possession.[9] Since the duty only arises if the detention of the property was unauthorized, the District Court and both parties consequently concentrated their analyses almost exclusively on the right of respondent to detain the property at issue. Consistent with this focus, respondent presented evidence by George Roberts, a mid-level Customs official, that ownership was a germane consideration in the Customs Service's processing of goods entering the country. The Court of Appeals found this evidence, which the District Court rejected (30-31a), and which pertained only to the Customs Service's right to consider ownership, to be sufficient grounds for overruling a concession by the Customs Service that if ownership were irrelevant, a duty to return arises. (8a). In other words, the Court of Appeals apparently improperly treated the issue of the right to detain the property and a duty to return it as being the same.

Having *sua sponte* overruled the concession by the Customs Service and the fact findings of the District Court, the Court of Appeals examined the statutes governing the Customs Service and found that they did not impose a duty to return the property in controversy. The Court of Appeals erred, however, in focussing exclusively on the relevant Customs statutes and regulations, rather than examining pertinent constitutional provisions, most notably the Fourth Amendment right to freedom from unreasonable searches and seizures and the Fifth Amendment right to due process, to ascertain whether they im-

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[9] Such an implied duty is not unusual. *See, e.g., United States v. Wright*, 610 F.2d 930 (D.C. Cir. 1979) (under Rule 41(e), Fed. R. Crim. P., U.S. Government has duty to return property illegally seized to person entitled to lawful possession); *benShalom v. Secretary of Army*, 489 F. Supp. 964, 970 (E.D. Wis. 1980) ("If a soldier's discharge is found to be violative of the Constitution, the implicit but clear non-discretionary duty of the respondents is to reinstate the soldier").

pose a duty to return the detained property.[10] While mandamus relief under 28 U.S.C. § 1361 traditionally was confined to purely ministerial duties, "its scope . . . has been gradually expanded to include suits by those who seek performance of constitutional duties owed them." *Alberio v. Hampton*, 433 F. Supp. 447, 450 (D. Puerto Rico 1977).[11] Indeed, the District Court recognized that the duty to return the property in question could be implied by the Constitution, yet it reserved on the constitutional issues because of the concession by the Customs Service that it owed such a duty once the courts determined that it lacked the authority to detain the goods. (22a). Moreover, the Court of Appeals neglected to consider whether, purely as a matter of statutory construction, its interpretation of the relevant Customs statutes would conflict with constitutional protections. *See United States v. Clark*, 445 U.S. 23 (1980) (the fact that one among alternate constructions would involve serious constitutional difficulties is reason to reject that interpretation in favor of another).[12]

Given these omissions by the Court of Appeals and the magnitude of the power conferred by the Court of Ap-

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[10] *See, e.g., United States v. Eight Thousand Eight Hundred and Fifty Dollars*, 461 U.S. 555 (1983) (Government's detention of seized currency for 18 months implicated claimant's due process rights).

[11] *See also Burnett v. Tolson*, 474 F.2d 877 (4th Cir. 1973); *Holmes v. Board of Parole*, 541 F.2d 1243, 1249 (7th Cir. 1976), *overruled on other grounds, Solomon v. Benson*, 563 F.2d 339 (7th Cir. 1977) ("Constitutional obligations as well as statutory duties are included within the perimeters of 28 U.S.C. § 1361").

[12] Because of the Customs Service's concession and the finding by the District Court, petitioners did not brief the issue of how an obligation by the Customs Service to return the property can arise from the Constitution, as well as pertinent statutes and regulations, or under principles of statutory construction. Even though its disallowance of respondent's concession opened these issues, the Court of Appeals did not invite briefing on them.

peals' reasoning upon the Customs Service to detain property indefinitely, the Court should exercise its supervisory function to consider the issues not reached by the Court of Appeals. Specifically, the Court should grant certiorari to rule upon the statutory authority of the Customs Service to detain the property in question here and the concomitant constitutionally-imposed duty to return the property to petitioners' possession if ownership is found to be irrelevant to the statutory scheme of the Customs Service, as well as to resolve the fundamental conflict between the Court of Appeals' opinion and the Second Circuit's decision in *Fonseca*.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the Court issue writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated: April 6, 1987

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 86-2154

RAMON AZURIN; GREGORIO ARANETA,
Plaintiffs-Appellees,

v.

WILLIAM VON RAAB, in his capacity as Commissioner of Customs of the United States Customs Service,
Defendant-Appellant.

Argued and Submitted Sept. 8, 1986

Decided Oct. 29, 1986

Appeal from the United States District Court
for the District of Hawaii

Before WALLACE, ALARCON, and BEEZER, Circuit Judges.

WALLACE, Circuit Judge:

The United States Customs Service (Customs) appeals from an order of the district court issuing a writ of mandamus requiring it to release from custody certain property imported into the country. The district court has jurisdiction pursuant to 28 U.S.C. § 1361. We have jurisdiction under 28 U.S.C. § 1291. We conclude that the writ of mandamus was improperly issued.

I

This dispute arises out of the highly publicized departure of former President Ferdinand Marcos from the Republic of the Philippines. On February 26, 1986, Ramon Azurin and Gregorio Araneta (Azurin) arrived by military transport in Hawaii as part of a group of 90 individuals traveling with Marcos. Accompanying Marcos and his entourage was a second plane loaded with currency, jewelry, and other valuables. Customs took immediate possession of this property and commenced formal entry processing. Soon after the arrival of Marcos, a dispute arose over ownership of the merchandise. On March 1, the President of the Republic of the Philippines, Corazon Aquino, sent a letter to the United States Ambassador to the Philippines, Stephen Bosworth, requesting that the United States not release the imported property until its legal ownership could be established. This request was apparently conveyed to Customs. Marcos, acting through Azurin, filled out all the requisite Customs declarations, agreed to pay all applicable tariffs, and requested that Customs release the property. Faced with the conflicting claims of ownership, Customs refused to do so.

On March 13, 1986, Azurin filed an action in the United States District Court for the District of Hawaii, seeking a writ of mandamus compelling Customs to release the property. Around the same time, the Republic of the Philippines sent a second letter to Ambassador Bosworth, formally claiming ownership of the disputed property. The Central Bank of the Republic of the Philippines subsequently filed two suits in the District of Hawaii seeking return of all currency and gold imported by Marcos and his party. On June 16, 1986, the Republic of the Philippines filed another action in the Central District of California seeking, among other things, return of all property brought in or allegedly owned by Marcos. In one of the actions in the District

of Hawaii, Customs sought leave to file a counterclaim and cross-claim which would implead the detained property. On June 6, 1986, the district court held a hearing in the instant case and issued the writ of mandamus, ruling that "Customs has no statutory duty or right to detain goods until such time as an importer proves legal ownership of the goods." Following the issuance of an emergency stay, Customs filed a timely appeal.

II

Mandamus relief is available to compel an official of the United States to perform a duty owed to an individual only if (1) the individual's claim is clear and certain; (2) the official's duty is "ministerial and so plainly prescribed as to be free from doubt"; and (3) no other adequate remedy is available. *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir.1986) (*Fallini*). Whether each element of the mandamus test is satisfied is a question of law reviewable de novo. *Id.*

The critical issue in this appeal pertains to the second prong of the mandamus test. In the case before us, this prong requires that Customs have a ministerial duty to release the goods so plainly prescribed as to be free from doubt. The starting point in determining the scope of Custom's duty lies in examining the language of the agency's enabling statutes. *Board of Governors v. Dimension Financial Corp.*, —— U.S. ——, 106 S.Ct. 681, 686, 88 L.Ed.2d 691 (1986). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Slyvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). Customs's statutory authority to detain goods is set out in section 1490(a) of the Tariff Act of 1930 (the Act):

> Whenever entry of any imported merchandise is not made within the time provided by law or the regulations prescribed by the Secretary of the Treas-

> ury, or whenever entry of such merchandise is incomplete because of failure to pay the estimated duties, or whenever, in the opinion of the appropriate customs officer, entry of such merchandise can not be made for want of proper documents *or other cause*, or whenever the appropriate customs officer believes that any merchandise is not correctly and legally invoiced, he shall take the merchandise into his custody . . . to be held . . until entry is made or completed and the proper documents are produced, or a bond given for their production.

19 U.S.C. § 1490(a) (emphasis added).

The parties' dispute centers on the phrase "or other cause." Customs argues that this phrase grants it broad discretion to detain goods for any number of reasons, including failure to prove ownership. Azurin argues that ownership is pertinent for purposes of entry only insofar as it is necessary for Customs to determine who is liable for duty. Since he has offered to pay all applicable duties, Azurin argues that ownership has been rendered irrelevant, and Customs therefore no longer has authority under section 1490 or any other statute to detain the disputed property.

Both sides concede that neither this statute, nor any other Customs statute or regulation, specifies an *explicit* duty to release goods under these circumstances. Because this is an action for mandamus, we need not determine the full scope of the authority of Customs to detain goods. Instead, the focus of our inquiry is limited to determining whether Customs has a clear ministerial duty to release the detained property despite the existence of conflicting claims of ownership.

The applicable statutes do not directly address this issue. However, some assistance in interpreting the statutory scheme is provided by the statute governing the "entry of merchandise," 19 U.S.C. § 1484(a)(2)(C).

That section requires all entry documentation to be filed by the "owner or purchaser" of the imported merchandise. When a consignee declares on entry that he is the owner, this same section provides that Customs "may, without liability, accept the declaration" of ownership. Customs argues that this language grants it broad discretion to inquire into ownership, and, if necessary, to detain property pursuant to section 1490 until ownership can be established. Azurin argues that section 1484(a)(2)(C) is merely a "hold harmless" provision that permits Customs to accept or reject a declaration of ownership without fear of liability so that it need not detain property until proof of ownership is produced. The applicable statutes and regulations do not define "owner or purchaser" for purposes of section 1484(a)(2)(c), nor do they explicitly state the reason for the section's "owner or purchaser" requirement.

The plain language of this section suggests that legal ownership may be relevant for purposes of entry. The statute requires entry documentation to be filed by the "owner or purchaser," *not* the "possessor" or "the individual willing to pay duties." Even more important, the statute does not create a clear ministerial duty to ignore legal ownership when determining whether to release goods.

Indeed, principles of administrative law implicated by the plain language of section 1484(a)(2)(C) suggest that Customs may well have to consider the issue of legal ownership before it can reject a declaration. Both sides concede that this section gives Customs the power to accept or reject a declaration of ownership made by a consignee. Customs, however, cannot act arbitrarily. It must have some justification for rejecting a declaration. *Cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971) (informal agency decisions must be based on con-

sideration of relevant factors.) The only possible justification for rejecting a declaration of ownership under this statute is that the Customs official has some reason to believe that the declarant does not have any right to possess the goods. Thus, in order to reject such a declaration, Customs necessarily has to consider "legal ownership." Interpreting the statute in a way that rendered legal ownership irrelevant would permit Customs to act arbitrarily.

Nor can we find a duty to ignore legal title in the agency regulations governing importation of property. Azurin relies on 19 C.F.R. § 101.1(1) (1985), which defines "importer" as the individual "primarily liable for the payment of any duties on the merchandise," to support the assertion that ownership is relevant only insofar as it is necessary to determine who is liable for duty. Section 1484(a)(2)(C), however, requires that the "importer of record" for purposes of documentation be either the "owner or purchaser" or, "when appropriately designated by the owner, purchaser, or consignee," a licensed customs broker. Thus, the statute suggests that for purposes of filing documentation, the "importer of record" must be someone with a legal right to possession.

At first glance, 19 C.F.R. § 141.12 (1985), governing the importation of merchandise other than by common carrier, appears to support Azurin's position. Section 141.12 creates a presumption that "[w]hen merchandise is not imported by a common carrier, possession of the merchandise at the time of arrival in the United States shall be deemed sufficient evidence of the right to make entry." The regulation does not address the issue of conflicting claims of ownership. The immediately preceding regulation, however, entitled "*Merchandise released directly to carrier*" contains the caveat that:

> Customs responsibility under this optional entry procedure *is limited to the collection of duties*, and

> constitutes no representation whatsoever regarding the right of any person to obtain possession of the merchandise from the carrier.

19 C.F.R. § 141.11(b) (1985) (emphasis added). Absence of this caveat in section 141.12, it can be argued, suggests that Customs's responsibility when entry is not made by common carrier can go beyond mere "collection of duties." But setting that argument aside, it is clear that section 141.12 only allows a possessor to "make entry." "Entry" is the act of filing the documentation required by Customs. *See* 19 C.F.R. § 141.0a(a) (1985). Plainly read, this regulation allows a possessor to file entry documentation. Nothing, however, requires Customs to accept that documentation. Section 141.12 does not create a ministerial duty to ignore legal ownership in determining whether to accept the documentation that is filed.

Therefore, our review of the applicable statutes and regulations shows that there is no explicit provision prohibiting Customs from considering or determining legal ownership for purposes other than levying duties. The district court, however, asserted that "200 years of Customs law and practice" as well as declarations made by various Customs officials that the agency would normally release the property in this situation demonstrate that Customs was required to accept Azurin's declaration of ownership. The court supported this conclusion by examining the legislative history of a repealed Customs statute, 19 U.S.C. § 1483 (1983). This section provided that property imported into the United States was held to be the property of the consignee, who in turn evidenced his rights to possession by holding a bill of lading.

Although we appreciate the strength of the position taken by the district court, we conclude it falls short of what is required in this case. To warrant the issuance of mandamus, the official's duty must be "ministerial and

so plainly prescribed as to be free from doubt." *Fallini*, 783 F.2d at 1345. Absent an explicit statutory or regulatory mandate, past agency behavior does not necessarily bind the agency to the same procedures, especially when it is faced with an extraordinary and unique situation. Thus, even if Customs may not have considered legal ownership in this type of situation in the past, it does not necessarily follow that a ministerial duty was created never to consider legal ownership. *Cf. United States v. Allegheney-Ludlum Steel Corp.*, 406 U.S. 742, 755, 92 S.Ct. 1941, 32 L.Ed.2d 453 (1972) (agency's authority to use rules of general application entails concomitant authority to make exceptions to allow for special circumstances); *Leonhard v. Mitchell*, 473 F.2d 709, 713 (2d. Cir.) (writ of mandamus is only appropriate when a government official fails to comply with an explicit statutory, regulatory or constitutional mandate), *cert. denied*, 412 U.S. 949, 93 S.Ct. 3011, 37 L.Ed.2d 1102 (1973).

Nor do we agree with the district court that this case may be decided on the basis that Customs "has conceded the duty to release the merchandise upon payment of duties and determination that the merchandise may enter the country lawfully." We do not find any concession by Customs that ownership is irrelevant in determining whether merchandise "may enter the country lawfully." The Regional Commissioner of Customs in charge of the Hawaiian district, William Logan, stated in the district court proceedings that under normal circumstances Customs would release property once duties were paid and all documentation was filed. It does not necessarily follow that this was a normal circumstance. Moreover, the district court stated that the affidavit of George Roberts, the District Director of Customs who was directly responsible for processing the disputed property, suggested that Roberts "routinely requires documentation verifying ownership of personal effects." Although the district

judge may reject this testimony, the testimony does at least demonstrate that Customs did not concede the issue. Indeed, there are no statements by any Customs officials in the record indicating that Customs has a *ministerial* duty to release merchandise where ownership is in dispute.

Nor are we persuaded by the district court's reliance on section 1483. Section 1483 was repealed in 1982, *see* Pub.L. No. 97-446, § 201(c), 96 Stat. 2349 (1982), and therefore has no direct bearing on this case. Even when in effect, section 1483 arguably did not render legal ownership irrelevant. *See, e.g., United States v. William H. Masson, Inc.*, 33 F. Supp. 874, 876 (D.Md.1940) ("[t]he one having legal title to, that is, the true holder of . . . a bill of lading, is the only one entitled to receive the goods").

III

Azurin's additional arguments fare no better. Azurin argues that the district court's decision is supported by *Fonseca v. Regan*, 734 F.2d 944 (2d Cir.) (*Fonseca*), *cert. denied*, 469 U.S. 882, 105 S.Ct. 249, 83 L.Ed.2d 186 (1984), and *Dunbar v. United States*, 502 F.2d 506 (5th Cir.1974) (*Dunbar*). In the first case, Fonseca sought return of a suitcase containing $250,000 in currency that had accidentally been misdirected to New York City from its original destination of Lima, Peru. The Customs officials refused to return the bag, suspecting that Fonseca had violated Colombian currency control laws. Fonseca, Columbia, and the State of New York subsequently filed claims to the money.

Fonseca never intended to enter the lost baggage into the United States. The case was decided on the common law ground that "the holder of a baggage claim check is ordinarily entitled to the return of checked baggage." *Fonseca*, 734 F.2d at 949. The decision was not based on the application of Customs statutes and regulations. Moreover, the court stated that conflicting claims of

ownership of the property asserted by the State of New York, the Columbian government, and the United States were not "colorable" or were "suspect." *Id.* at 950. There is no indication in the record that the claim of the Republic of the Philippines is not colorable.

Dunbar is even less germane. There, the court ordered the Federal Bureau of Investigation and the Internal Revenue Service to return $21,500 that Dunbar had mailed but that had not reached the addressee. The court's decision was based on Post Office regulations substantially different from the statutes and regulations implicated in this case. Furthermore, the property in *Dunbar* was not subject to conflicting claims of ownership, but intead was being held pending the resolution of an FBI investigation. *Dunbar*, 502 F.2d at 507-08. Thus, neither side has cited, nor have we found, any decision suggesting that Customs has a ministerial duty to ignore legal ownership in the execution of its duties.

Azurin also argues that Customs detention of the property is improper because interpleader is inappropriate. The interpleader action is still pending before the Hawaiian district court. This issue is not ripe for appellate review.

Azurin argues that because Marcos was designated a "distinguished foreign visitor" for purposes of Secret Service protection, Customs regulations require it to admit the baggage and effects of the Marcos party "free of duty and without having to file an entry." 19 C.F.R. § 148.82(b)(4) (1985). Under this regulation, special treatment is accorded to individuals who are designated "distinguished foreign visitors" by the Department of State. The Department of State never designated Marcos a "distinguished foreign visitor." The regulation is inapplicable.

Finally, both sides present spirited arguments that important foreign policy considerations justify disposition

of the suit in their favor. Because of the narrowness of our focus, we need not reach this issue.

IV

In conclusion, we emphasize the narrowness of our holding. We do not reach the question of whether the first or third prongs of the mandamus test were met. Nor do we reach the issue of whether Customs has discretion to inject foreign policy considerations into the execution of its statutory duties. We consider only the narrow statutory question of whether Customs has a clear ministerial duty to ignore disputes over legal ownership in determining whether to release goods from detention. There is no explicit statute or regulation requiring Customs to return the property in this situation. While Customs may normally release goods without considering legal ownership beyond what is necessary to levy duties, there is no statute or regulation specifically prohibiting it from doing so. Custom's duty to release imported property when faced with facially valid conflicting claims of ownership is not "ministerial and so plainly prescribed as to be free from doubt."

REVERSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 86-0189

RAMON AZURIN and GREGORIO ARANETA,
Plaintiffs,

vs.

WILLIAM VON RAAB, in his capacity as COMMISSIONER OF CUSTOMS OF THE UNITED STATES CUSTOMS SERVICE,
Defendant.

[Filed June 6, 1986]

WRIT OF MANDAMUS

TO WILLIAM VON RĀAB, Commissioner of Customs of the United States Customs Service:

WHEREAS, plaintiffs have filed an action in this court in the nature of mandamus wherein it appears that Ferdinand Marcos is the importer of record of certain merchandise imported to this country, and

WHEREAS, Marcos and his agents have complied with all applicable laws relating to entry of said merchandise, and there is no adequate remedy available to them in the ordinary course of law.

NOW, THEREFORE,

YOU ARE HEREBY ORDERED to release the merchandise described on that Certain Customs Form 7501 executed by Gregorio Araneta as attorney in fact for Ferdinand Marcos upon payment of any assessed duties

or upon posting of appropriate bond as provided by the Customs laws or regulations; and

YOU ARE FURTHER ORDERED to release to Ferdinand Marcos or his agents the currency and negotiable instruments described on those certain Customs Forms 4790 executed by Ramon Azurin as attorney in fact for Ferdinand Marcos.

DATED: Honolulu, Hawaii, June 6, 1986

[SEAL]

/s/ Harold M. Fong
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 86-0189

RAMON AZURIN and GREGORIO ARANETA,
Plaintiffs,

vs.

WILLIAM VON RAAB, in his capacity as COMMISSIONER OF CUSTOMS OF THE UNITED STATES CUSTOMS SERVICE,
Defendant.

[Filed June 6, 1986]

DECISION AND ORDER

Plaintiffs having filed an action in this court in the nature of mandamus, and having filed a motion styled "Request for Mandamus to Compel the Commissioner of Customs to Release Certain Projerty," the court having considered the memoranda and arguments in support or and in opposition thereto, and being fully apprised of the premises therein, the court finds as follows:

I. FACTS

The complaint in this action, filed on March 13, 1986, alleges that the plaintiffs signed certain customs declarations in their capacity as agents for Ferdinand Marcos ("Marcos"), the importer of record, who is attempting to make entry of certain property through Customs in Honolulu after arriving at Hickam Air Force Base from the Philippines. According to the complaint, William Logan, Deputy Regional Commissioner of Customs for

the Pacific Region, orally advised plaintiffs' counsel that inspection and examination, as well as all paperwork related to the property in the custody of Customs, had been completed but that the defendant, the Commissioner of Customs, refused to release the property to plaintiffs. Plaintiffs seek a writ of mandamus ordering defendant to release the goods.

The facts of this case are largely undisputed. George Roberts, the District Director of Customs, states in his affidavit that the merchandise at issue here is presently in Customs' custody. The goods were first examined on February 26, 1986. Mr. Roberts concluded then that formal entry procedures should be followed. The Customs Service followed formal appraisement procedures as prescribed by 19 C.F.R. Part 143. Customs listed and described each item, and determined its value and classification. On March 6, 1986, Marcos' agents told Customs that they intended to claim all the merchandise as personal effects. They were instructed to prepare Entry Form 7501. That form was executed by Gregorio Araneta as attorney in fact for Marcos. A Form 4790 was signed by Ramon Azurin, as attorney in fact, covering the currency and negotiable instruments imported by Marcos. Examination of the goods was completed on March 11, 1986. All documents imported, other than currency and negotiable instruments, were flown to Customs Headquarters in Washington, D.C. for inspection. Ultimately, copies of these documents were released to various parties pursuant to subpoena or executive agreement.

Roberts' affidavit goes on to say that he subsequently determined that additional information was needed prior to entry relating to the proper value and classification of the merchandise, which was requested of defendants. Roberts also claims that he sought information in order to "determine and verify ownership." Curiously, the attached Customs Form 28 "Request for Information"

which was prepared by Roberts' staff, does not seek any information relating to ownership, but requests only the following:

1. Complete list of items entered.
2. Invoices or receipts for items showing price paid.
3. Insurance documents or other documents verifying value (in the absence of invoices or receipts).
4. Note whether the articles entered herein are being imported for sale or personal use.
5. Certificate of Antiquity or Philippine Government permit to export antiques from the Philippines.

Customs has not requested any additional documentation from the plaintiffs.

Mr. Logan, currently a Regional Commissioner of Customs, who oversaw the entry process in this case, stated in his declaration that "[t]he matters that I concluded required disposition by Customs Headquarters in Washington pertained to whether or not duties should be assessed on the dutiable merchandise, and whether certain riders attached to the currency declaration forms, that appeared to disclaim representations made on the forms, were legally acceptable." [1] Mr. Logan stated further that he spoke to plaintiffs' counsel, at which time it was his view that the Honolulu field office had completed as much of the processing as it could, that Mr. Roberts had calculated the dutiability of the merchandise, and that all information had been relayed to Customs Headquarters in Washington. Mr. Logan's deposition was taken on May 27, 1986. At that time, he testified that Customs is not holding the property pursuant to any investigation, and that he was unaware of the reason why the Commissioner had declined to release the merchandise. He

[1] Defendant does not advance either of Mr. Logan's initial concerns as a ground for detaining the merchandise at this time.

admitted that the plaintiffs had done all they could to comply with the entry requirements. Logan further admitted that the detention was contrary to normal procedure. In light of the unusual circumstances of the case, he requested and received written instructions not to release the property. Even counsel for defendant conceded in oral argument that this was "a case of first impression."

The foregoing facts have caused this court to have grave reservations about Customs' conduct in this case. In particular, this court suspects that certain employees and attorneys representing Customs have been less than candid with the court. As will be discussed below, Customs has also been rather circumspect in its presentation of the law to this court.

II. SUBJECT MATTER JURISDICTION

The plaintiffs filed identical claims in this court and in the Court of International Trade. Plaintiffs have invoked this court's jurisdiction under 28 U.S.C. § 1361, which states:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Plaintiffs simultaneously invoked the jurisdiction of the Court of International Trade pursuant to 28 U.S.C. § 1581(i), which states:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

In the early days of this litigation, it became evident that plaintiffs were pressing for two types of relief. First, plaintiffs were seeking mandamus relief against defendant to compel release of the merchandise. Second, plaintiffs were seeking injunctive relief against defendant to prohibit access by third parties to the merchandise. On March 13, 1986, this court entered a temporary restraining order addressed to the second claim for relief, enjoining and restraining defendant from allowing any third party access to the property itemized in the two customs declarations, unless such parties were entitled to access pursuant to any subpoena, other legal process compelling production or pursuant to the laws or treaties of the United States.

On or before March 17, 1986, the Court of International Trade was presented with a motion for temporary restraining order in which the plaintiffs asked that court to issue a temporary restraining order broader than the one issued by this court. That court declined to do so. In the course of its ruling, however, the court found that it had subject matter jurisdiction over the first claim for relief under 28 U.S.C. § 1581(i).

Both parties have argued here that this court, not the Court of International Trade, has jurisdiction over this action to compel the defendant by writ of mandamus to release the property. This court agrees. For the reasons stated below, the court finds that subject matter jurisdiction over this action is vested in the district courts by virtue of their broader grant of jurisdiction under 28 U.S.C. § 1361.

Ultimately, the decision relating to subject matter jurisdiction rests with this court. A federal court is duty-bound to determine whether it has subject matter jurisdiction—on its own motion if necessary. *In Re Martinez*, 721 F.2d 262, 264 (9th Cir. 1983); *Csibi v. Fustos*, 670 F.2d 134, 136 n.3 (9th Cir. 1982).

This court recognizes that the analysis must begin with the more specific grant of jurisdiction provided to the Court of International Trade, which carves out an exception to the broader grant of jurisdiction to the district courts. *Vivitar Corporation v. United States*, 761 F.2d 1552, 1159-60 (Fed. Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 791 (1986). The legislative history of section 1581(i) suggests a broad grant of residual jurisdiction to the Court of International Trade. However, the Court of International Trade has ruled that as a threshold to its jurisdiction, the action must at least arise out of customs or international trade laws. *See id.* at 1422.

In this case, however, the plaintiff has not properly alleged any duty arising out of a customs law or regulation by which the defendant is compelled to release the merchandise. Plaintiffs do cite to 19 C.F.R. 142.19(b) in their complaint, which states:

> (b) *After liquidation.* If a bond has not been filed in accordance with paragraph (a) of this section, the merchandise shall not be released before:

> (1) The entry has been liquidated and the full amount of all duties and taxes due, including dumping or other special duties and charges, has been paid, or the right to free entry established.
>
> (2) The district director determines that the merchandise may be admitted into the commerce of the United States, and
>
> (3) All documents relating to the merchandise which are required by law or regulation have been filed.

The plain language of this regulation reveals therein no duty to release the merchandise stated there. Nor can the court find any other Customs statute or regulations specifying a duty to release goods under these circumstances. Thus, this action for mandamus cannot arise from a Customs law or regulation. That finding does not end the inquiry, however. Pursuant to its broader mandamus jurisdiction, this court has subject matter jurisdiction over an action to compel the defendant to perform a duty arising from a source other than the Customs laws and regulations, such as the Constitution or laws of the United States. *See, e.g., Elliot v. Weinberger*, 564 F.2d 1219, 1226 (9th Cir. 1977), *rev'd on other grounds*, 442 U.S. 682 (1979) (district courts have mandamus jurisdiction to define and impose constitutional duties upon government officers); *Tongol v. Usery*, 601 F.2d 1091, 1098 (9th Cir. 1978) (district court has mandamus jurisdiction over section 1983 claim against Secretary of Labor).

II. STANDARD

Defendant is correct that, despite its designation, this motion is essentially one for summary judgment, asserting that plaintiffs are entitled as a matter of law to the relief they seek. A movant is entitled to summary judg-

ment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c) of the Federal Rules of Civil Procedure; *Bieghler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980). The moving party has the burden of demonstrating the absence of a genuine issue of fact. *Id.*

III. THE MERITS

At the outset, it is important here to clarify what this case is not. This action does not purport to determine any private rights of ownership in the merchandise. The court's decision in this case will not in any way preordain any party's rights of ownership of the property.[2] The sole issue here is whether, in the absence of a seizure or investigation, Customs can detain the goods any longer once it has received and processed the entry documents, classified and valued the goods, and assessed duty. The defendant argues three grounds for detention of the merchandise: 1) he is entitled to detain the merchandise pending investigation into violations of law; 2) he may detain the goods pending determination of the true owner of the merchandise; and 3) the detention of the merchandise must be respected as a decision by the executive branch pursuant to its foreign policy powers.

A. *Standard for Granting Mandamus*

To prevail on an application for mandamus, the plaintiff must show: (1) the plaintiff's claim is clear and

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[2] At oral argument, defendant's counsel was asked to identify precisely what liability Customs or its employees faces if it releases the merchandise. Counsel could only speculate that an international tribunal might be established in which the Government of the Philippines might press its claim against the United States. Clearly, Customs faces no civil liability for releasing the merchandise. 19 U.S.C. § 1484(2)(C).

certain; (2) the duty of the officer is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available. *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986).

In this case, the plaintiffs argue that the defendant's detention violates their constitutional rights, and that defendant should therefore be compelled to release the goods. However, the court need not consider the novel constitutional issues raised in this case, because the defendant has admitted that "[after] Customs determines that merchandise may enter the country lawfully, and that all applicable duties have been paid, it must release the merchandise." *Defendant's Opposition to Motion for Preliminary Injunction*, p. 17. Plaintiffs stand ready to pay any assessed duties. It only remains to determine whether the merchandise may enter the country lawfully.

The Customs Service argues that it has not yet determined whether the goods may lawfully enter the country. As discussed below, however, Customs' doubts as to whether the goods may lawfully enter the country are not legitimate.

B. *Seizure Pursuant to an Investigation*

Customs argues that it has the right pursuant to 19 U.S.C. § 482 to seize and detain the merchandise. Section 482 states:

> Any of the officers or persons authorized to board or search vessels may stop. search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and

> to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vessel, beast or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.

Customs argues that under this provision they have the duty to seize and detain any articles which appear to violate the laws of the United States. In particular, Customs has the authority to seize goods which it has reasonable cause to believe have been imported in violation of the National Stolen Property Act, 18 U.S.C. § 2314. Under that Act, it is sufficient that the laws of a foreign country deem the goods to be property of that government. *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974); *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979), *cert. denied*, 444 U.S. 918 (1979).

The one flaw in this argument is that it is purely academic. Defendant's agents and attorneys have repeatedly told the plaintiffs and this court that the defendant has not seized the goods pursuant to any investigation into potential violations of United States law. Thus, defendant's own conduct belies this argument as a ground for the current detention. Equally fallacious is the defendant's argument that ordering the release of the merchandise in cases such as this would mean that Customs "would be helpless to prevent possibly stolen merchandise from crossing our borders." Plainly, if the Customs inspector has reasonable cause to believe that merchandise is stolen, he can—indeed must—seize the merchandise pursuant to section 482. For some inexplicable reason,

Customs continues to advance this argument in spite of its unwillingness to seize the goods. If Customs gives credence to the claim by the new Philippine government that the property is stolen, it is required by statute to seize the merchandise. To date, it declined to do so.

C. *Right to Detain Goods Pending Determination of Ownership*

Next, defendant argues that he has a statutory duty to detain the goods until the plaintiffs prove ownership of the merchandise.

The defendant relies in part on the language of 19 U.S.C. § 1490(a):

> Whenever entry of any imported merchandise is not made within the time provided by law or the regulations prescribed by the Secretary of the Treasury, or whenever entry of such merchandise is incomplete because of failure to pay the estimated duties, or whenever, in the opinion of the appropriate customs officer, entry of such merchandise cannot be made for want of proper documents or other cause, or whenever the appropriate customs officer believes that any merchandise is not correctly and legally invoiced, he shall take the merchandise into his custody and send it to a bonded warehouse or public store, to be held at the risk and expense of the consignee until entry is made or completed and the proper documents are produced, or a bond given for their production.

This section gives Customs the authority to detain merchandise when "entry of such merchandise can not be made for want of proper documents or other cause." The plaintiffs state that they have executed all the customs forms required and have provided all the documentation requested, a fact which Customs does not dispute. Customs cannot rely on a lack of documentation as a reason for detention. In any event, the language of the section

begs the ultimate question here whether Customs can detain the goods pending determination of "true" ownership. The statute does not stand for the proposition that Customs may do so.

Alternatively, Customs asserts that as part of its responsibility to determine that goods may lawfully enter the country, it must determine ownership. This argument is based on the language of 19 U.S.C. § 1484(a)(2)(C), which states:

> (a)(1) Except as provided in section 1490, 1498, 1552, 1553, and 1336(j) of this title and in subsections (h) and (i) of this section, one of the parties qualifying as "importer of record" under paragraph (2)(C) of this subsection, whether in person or by an agent authorized by him in writing—
>
> > (A) shall make entry therefor by filing with the appropriate customs officer such documentation as is necessary to enable such officer to determine whether the merchandise may be released from customs custody;
> >
> > * * *
>
> (2)(C) When an entry of merchandise is made under the section, the required documentation shall be filed either by the owner or purchaser of the merchandise or, when appropriately designated by the owner, purchaser, or consignee of the merchandise, a person holding a valid license under section 1641 of this title. When the consignee declares on entry that he is the owner or purchaser of merchandise, the appropriate customs officer may, without liability, accept the declaration. For the purposes of this subtitle, the importer of record must be one of the parties who is eligible to file the documentation required by this section.

The defendant relies on the language of the statute to argue that Customs has the discretion to hold merchandise

until it has determined "true" ownership. This argument flies in the face of nearly 200 years of Customs laws and practice, a history which is completely ignored in the arguments presented to this court.

Prior to 1983, the "owner" of imported merchandise for Customs purposes was designated by statute. 19 U.S.C. § 1483 stated:

> For purposes of this title—
>
> (1) All merchandise imported into the United States shall be held to be the property of the person to whom the same is consigned; and the holder of a bill of lading duly indorsed by the consignee therein named, or if consigned to order, by the consignor, shall be deemed the consignee thereof.

Section 1484 provided at this time the consignee or his agent was to make entry of the goods. 19 U.S.C. § 1484(a).

An elucidation of the purposes behind these statutes was provided in *Top Form Brassiere Mfg. Co. v. United States*, 68 Cust. Ct. 288 (1972), which summarized the history of the statutes:

> A study of the pertinent legislation reveals that the terms "importer," "owner," and "consignee," when used in the tariff laws, have somewhat different meaning than when used in a purely commercial sense. These distinctions are historic. For example, merchandise imported into the United States has long been deemed, under the various tariff statutes, to be the property of the person to whom it was consigned. . . . The provision holding the consignee liable as owner, which has been the law since 1799, was enacted for the purpose of preventing fraud upon the government arising from collusive transfers. *Lafontan v. Elting*, 54 F.2d 664 (1931). It also relieves the government from the problems which face a col-

lection agency in having "to hunt up any ultimate consignees, when there is a primary consignee . . ." *Baldwin v. United States*, 113 F. 217, 218 (1902), or from having to determine which party is contractually liable for the duties. . . . [citations omitted]. . .

Prior to the Tariff Act of 1922, the administrative provisions of the tariff laws relating to entry of merchandise generally referred to actions to be taken by the "owner, importer, consignee or agent," or by the "owner, consignee or agent.". . .

Although, as indicated, the statutes provided that the person to whom the merchandise was consigned was deemed to be the owner, little distinction was made among the owner, importer, or consignee for purposes of entering the merchandise, or in filing appeals for reappraisement.

The procedures governing entry of merchandise were drastically revised by the Tariff Act of 1922. . . The Senate amendments changed the provisions for making entry and eliminated all the previous references to "owner" and "importer." [The legislative history indicates that t]he Senate amendments [made] the consignee the only person responsible in the importation of merchandise and the necessary changes have been made throughout the title. . . .

The Report makes abundantly clear that the amendments adopted in the final version of the Act of 1922, and carried over in the Tariff Act of 1930, were designed and intended to make the consignee the sole person liable to the government for the customs duties. The "actual" owner was not intended to be liable unless he assumed the obligation in accordance with section 485(d). . . .

. . . That the statutory consignee only is liable for payment of duties was recognized during consideration of [the Tariff Act of 1930]. . . .

This discussion shows that the definition of ownership for Customs purposes under the Customs statutes for over 150 years never involved a determination of legal title. The "owner" of the merchandise for Customs purposes was not the legal owner, but the consignee of the merchandise, who was liable for duty. Identification of the actual owner of the merchandise was irrelevant for Customs purposes unless the actual owner voluntarily stepped forward to file a declaration and bond relieving the consignee from liability for duties.

The wisdom of this statutory scheme is obvious. By Customs purposes and imposing on the consignee the duty to make entry, Customs concerned itself only with collecting duty and not with property disputes. As long as Customs released the property to the consignee, it was relieved of any liability for release of the goods to the wrong party. *See Conklin v. Newton*, 34 F.2d 612 (2d Cir. 1929); *Giles v. Newton*, 21 F.2d 484 (E.D.N.Y. 1927).

The statute relied on by defendant was passed as part of a bill originally introduced into Congress in 1981 to amend various tariff schedules, and to amend the customs laws to conform with the 1972 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property. Somehow, in the one-day period while the bill was in conference, a new title was added to the bill repealing 19 U.S.C. § 1483 and amending section 1484 to read as it does in its current form. This title of the bill has no legislative history that the court can find. The revision of the statutes eliminated the statutory designation of ownership. Instead, section 1484 states that a Customs officer is entitled to rely on a consignee's declaration that he is owner or purchaser, and may accept that declaration without liability.

The clear effect of the amendments of sections 1483 and 1484 was to expand the number of categories of persons who were eligible to make entry and who would be liable

for duty. While the statutory amendments did away with the statutory designation of ownership for Customs purposes, there is no indication in the statute or the legislative history that Congress intended to upset the nearly 200 year-old practice of Customs to determine ownership of the property only insofar as it is necessary to determine the party who was liable for duty. Regulations enacted by the Secretary of the Treasury in the Code of Federal Regulations are consistent with this traditional view of Customs functions. For example, 19 C.F.R. § 101.1(k)(1) states:

> *Importer.* "Importer" means the person primarily liable for the payment of any duties on the merchandise, or an authorized agent acting on his behalf. The importer may be:
>
> (1) The consignee, or
>
> (2) The importer of record, or
>
> (3) The actual owner of the merchandise, if an actual owner's declaration and superseding bond has been filed in accordance with § 141.20 of this chapter, or
>
> (4) The transferee of the merchandise, if the right to withdraw merchandise in a bonded warehouse has been transferred in accordance with Subpart C of Part 144 of this chapter.

Following the repeal of 19 U.S.C. § 1483, Customs made no change in the regulations which would suggest that a change in procedure was required by the enactment. Nowhere in the statutes or the accompanying regulations is the term "owner" defined. Nor are there any procedures set out for determining "ownership." Moreover, the regulations provide in Part 141, Subpart B that when merchandise is not imported by a common carrier, possession of the merchandise at the time of arrival in the United States "shall be deemed sufficient evidence of the right to make entry." 19 C.F.R. § 141.12. It is apparent

from the legislative history behind section 1484, as well as from the regulations, that Customs has never required evidence of ownership for any other purpose than to determine who shall be liable for duty. Indeed, William Logan, a Regional Commissioner of Customs, testified in this proceeding that Customs considers itself a neutral party in disputes over merchandise; absent a court order, it will release merchandise after normal processing.

It is manifest from the record in this case that Customs does not require proof of ownership prior to entry. Mr. Logan was very forthright in his deposition when he conceded that the detention of the property in this case is contrary to normal procedure. Indeed, Logan felt it necessary to obtain written directions from Customs headquarters in Washington to detain the merchandise because under normal circumstances, it would have been released. According to Logan, the Customs Service has obtained all the necessary documentation, all the necessary information has been entered, and no further information has been requested from plaintiffs. He stated that he was simply told that the merchandise would not be released. Although duties have apparently been assessed, plaintiffs were not given notice of the amount of duty so that they might pay it and obtain release of the merchandise.

The only suggestion that Customs is processing this merchandise under routine procedures is in certain statements made in the affidavit of George Roberts, District Director of Customs. However, the affidavit contains telling inconsistencies which belie this assertion. On the one hand, Roberts claims in his affidavit that he processed the goods according to normal procedures, suggesting that he routinely requires documentation verifying ownership of personal effects. On the other hand, he is at a loss to direct this court to the statutory and regulatory authority for such an inquiry (this absence is conspicuous in an affidavit which is rife with citations to regulations). Also, when one looks at the Request for Information given to

Marcos by Roberts' staff (prior to execution of the affidavit), there is not a single document requested which would allow Customs to conclusively determine ownership—all documents requested are directed either toward the issue of valuation or (in one case) the importer's right to import antiquities. Nor has Mr. Roberts made any further inquiries into the issue, stating that he has ceased processing the entry. Particularly in light of directly contrary statements from Mr. Roberts' superior, the bare suggestion that he would require proof of ownership from Marcos does not create a material issue of fact as to whether Customs routinely asks for proof of ownership prior to entry.

This court concludes that Customs has no statutory duty or right to detain goods until such time as an importer proves legal ownership of the goods. Nor does it require such proof of ownership as a matter of practice. Customs' authority to detain goods pending assessment of duty and compliance with all applicable laws cannot be construed as authority to detain the goods pending ultimate determination of ownership.

D. *Foreign Policy Powers*

Finally, the defendant argues that the property is being detained pursuant to the foreign affairs authority of the executive branch. Defendant points to the well-established proposition that the President has "plenary and exclusive power" over foreign affairs, and may take actions in furtherance of foreign policy interests which affect the rights of private citizens. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319-20 (1936); *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981). It has been long established that treaties and executive orders signed by the President pursuant to his authority over foreign affairs have the force and effect of law. *See id.*

It is clear in this case that the Government of the Philippines has made a claim for these goods at the high-

est diplomatic levels. Notably absent from record, however, is any agreement or executive order signed by the Chief Executive, which would have the binding force of law, ordering or promising that the United States Customs Service will detain the merchandise imported by plaintiffs. This court will not usurp the foreign affairs powers of the executive branch; neither, however, will it attempt to implement that authority in the absence of a definitive statement of the exercise of such power by way of an executive order or treaty.

As a fall-back argument, defendant cites *Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1977) for the proposition that the courts must tread lightly when a court order directed toward an official of the executive branch would upset the delicate balance of American foreign relations. In *Adams*, the court of appeals was presented with a declaration by the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs detailing the damage that would be done to American foreign relations if the trial court's preliminary injunction order were affirmed on appeal. Here, defendant has submitted the declaration of Michael H. Armacost, Under Secretary of State for Political Affairs, who declares that the detention of the documents imported by Marcos is consistent with this country's support of the new administration in the Philippines.

The court might have been persuaded by this argument if the posture of the executive branch in this case was as clearly established as it was in the *Adams* case. Unfortunately, the executive branch has issued mixed signals on this matter. On the one hand, the Armacost declaration purports to set forth the posture of the administration on the propriety of detention. In fact, the declaration only addresses the need to turn over copies of the documents to the Government of the Philippines—which has already been done. In contrast to the declaration is a letter from the White House to the Secretary of

the Treasury informing him that the President has designated Ferdinand Marcos as a "distinguished foreign visitor" pursuant to 18 U.S.C. § 3056(a)(6) for purposes of Secret Service protection. Plaintiffs point out the language of 19 C.F.R. § 148.82, which states:

> (b) *Exemption for baggage and effects and admission without entry.* The baggage and effects of the following representatives of foreign governments shall be admitted free of duty without the filing of an entry, upon the request of the Department of State and appropriate instructions from the United States Customs Service in each instance:
>
> > (4) Other high officials of foreign governments and such distinguished foreign visitors as may be designated by the Department of State. . . .

While Ferdinand Marcos is arguably not a distinguished foreign visitor "designated by the Department of State," the letter still suggests that the President has determined that Marcos is entitled the privileges and honors befitting the status of a distinguished foreign visitor. To date, the executive branch simply has not taken any definite position with respect to the detention of this merchandise. It is not the province of the judicial branch to accord every suggestion of foreign policy concerns or demand made upon the United States by a foreign government as having the force of law.

E. *Application of the Three Factors*

The court now considers the three-factor test for granting mandamus. First, it must be established that the plaintiff has a clear and certain claim. Here, the plaintiffs have admittedly produced all the entry documentation requested, and stands ready to pay all duties or post bond for such duties. Mr. Logan has testified that nothing further is required of the plaintiffs with respect to the entry process, and the processing has been

completed to the point where, under normal circumstances, the merchandise would be released. There is no question that Marcos will be the party liable for any duty on the merchandise. Finally, defendant has not seized the merchandise pursuant to any investigation into violations of United States law. Thus, Marcos' claim to the goods is clear and certain for Customs purposes.

Second, the plaintiffs must establish that the duty of the officer is ministerial and is so plainly prescribed as to be free from doubt. Here, defendant has conceded the duty to release the merchandise upon payment of duties and determination that the merchandise may enter the country lawfully. Plaintiff has shown that it has complied with all applicable laws relating to entry of these goods. Even a high-ranking official of Customs observed that the normal Customs procedure would be to release the goods at this point upon plaintiffs' payment of any duty. Indeed, he was so startled by the instructions not to release the goods that he insisted on written instructions from the Commissioner and an opinion letter for the Chief Counsel for the Customs Service to satisfy himself that Customs was proceeding legally. There can be no doubt that this merchandise may lawfully enter the country.

Finally, the plaintiff must show that no other adequate remedy is available. Defendant argues that plaintiffs have not yet filed an administrative protest with Customs. In circular fashion, he also argues that the detention of the merchandise is not a protestable decision. Therein lies plaintiffs' dilemma. If Customs were to issue a decision to exclude the merchandise, Marcos would be entitled to protest the decision. *See* 19 C.F.R. §§ 174.11(d), 174.12. Here, however, defendant has not exercised any statutory or administrative authority whatsoever. Rather, by simply declining to make any final protestable decision, defendant can indefinitely detain the merchandise and evade any challenge by plain-

tiffs through administrative procedures. It is precisely because Customs refuses to make a protestable decision to exclude the merchandise that plaintiffs have been forced to resort to this mandamus action, having no other remedy to compel Customs to act.

To continue to detain this merchandise under the circumstances of this case, where all entry requirements have been discharged is to do so without precedent in law or Customs practice. A writ of mandate shall issue ordering defendant to issue a notice of assessed duties to plantiffs. Upon payment of said duties, defendant shall release the merchandise to the plaintiffs.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, June 6, 1986.

/s/ Harold M. Fong
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 86-0189

RAMON AZURIN and GREGORIO ARANETA,
Plaintiffs,

vs.

WILLIAM VON RAAB, in his capacity as COMMISSIONER OF CUSTOMS OF THE UNITED STATES CUSTOMS SERVICE,
Defendant.

[Filed June 17, 1986]

ORDER DENYING MOTION FOR STAY PENDING APPEAL

Defendant has moved for a stay pending appeal of this Court's Order granting the plaintiffs' motion for a writ of mandamus to compel release of certain merchandise currently being detained by Customs. For the following reasons, the court will deny the motion for stay.

The court is taking the unusual step of addressing the assertions in Defendant's Memorandum in Support of His Motion for Stay Pending Appeal because several of these points have never before been raised before this court. Nonetheless, the court does not feel that they warrant a stay pending appeal.

I. STANDARD

The defendant has properly stated the standard for granting a stay pending appeal. The test is similar to

that employed to review a motion for preliminary injunction as articulated in *Los Angeles Coliseum v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980). *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983), *rev'd on other grounds*, 104 S.Ct. 10 (1983) (Secretary of Health and Human Services sought a stay of district court's injunction). At one end of the continuum, the moving party is required to show both a "probability of success on the merits and the possibility of irreparable injury," and at the other end of the continuum, the party must demonstrate that "serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Id.* Defendant's arguments are addressed to the latter extreme of the continuum.

A. *Serious Questions*

1. *Duty of the Defendant*

For the first time, defendant attempts to characterize this mandamus action as presenting the "narrow question . . . whether the Commissioner had a plain and ambiguous ministerial duty to construe "owner" as always meaning the importer or consignee notwithstanding any competing claims by another as to legal ownership." Also, for the first time defendant has made an argument based on the legislative history of the specific customs statutes relied upon here. Finally, the defendant for the first time attempts to bring to the court's attention a previous instance in which Customs has detained goods pending determination of ownership.

The court previously, and in some detail, considered the legislative history of the statute—albeit without any assistance from counsel in this matter. The court considered the arguments now raised by defendant, but determined that, in the absence of any legislative history or change in the regulations enacted by the Secretary of the Treasury, there had been no change in Customs' historic prac-

tice of determining ownership only for purposes of ascertaining liability for duty. In any event, these arguments go only to interpretation of the statutes in question. The fact that a statute may have to be interpreted in order to determine the duties of the defendant, does not preclude mandamus relief. *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986).

In this case, defendant admitted that, after duties have been paid and a determination that the merchandise may enter the country lawfully, he must release the merchandise. The only inquiry left to this court was whether the merchandise could enter the country legally. The court determined that the plaintiffs had complied with all applicable laws and procedures, thus triggering defendant's admitted obligation to release the merchandise.

As to defendant's belated attempts to bring to this court's attention a previous instance in which Customs has followed this same procedure under similar facts, the citation to a case pending in another court without any elaboration on the facts or rulings by the court is of absolutely no precedential value. The court would add that the facts of the *Lee Moore* cases involve the attempted importation of cultural antiquities, which were detained pursuant to the National Stolen Property Act. *See United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974); *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979), *cert. denied*, 444 U.S. 918 (1979). The defendant has repeatedly stated that the case at bar is not one of a seizure or detention pursuant to any investigation into violations of United States law.

Similarly, the defendant fails to explain how "the absence of case law, the existence of intervening congressional action, and the . . . statutory language" supports the probability of success on appeal when these arguments were never raised before this court. Obviously, the defendant did not find them sufficiently compelling when originally briefing the case before this court.

2. *Foreign Policy Considerations*

Defendant reiterates its argument on foreign policy considerations, relying again on *Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1977), a case in which the court was apprised of the fact that the lower court's injunction would upset a foreign policy action before an international commission—a course of action which had been approved by the President. *Id.* at 952. Defendant accuses this court of manufacturing a split within the executive branch to sustain its decision. To the contrary, this court merely observed that unlike the *Adams* case, where the foreign policy position of the chief executive was clear, the record in this case does not support the defendant's argument that his action represents an action taken or approved by the chief executive pursuant to his foreign policy powers.

The defendant argues that the court's decision will "interfere with the Executive Branch's execution of its foreign policy." In an effort to bolster the foreign policy argument, the defendant takes the peculiar step of attaching a *new* declaration from Michael H. Armacost to its memorandum in support of the stay. While the appellate courts have in the past agreed to consider such belated declaration, *see Adams, supra* at 956 n.13, this particular declaration does not add anything new to the proceedings. In fact, it reveals the major fallacy in the government's argument. Mr. Armacost states at paragraph four that "[t]he United States Government has repeatedly told the Aquino Government, through diplomatic channels and otherwise, that *claims to disputed property would be handled in accordance with U.S., Philippine and international law*," and that the United States intends to have the question of ownership determined by the courts. Repeatedly, in this and in related proceedings, the court has been told on the one hand that decision as to ownership rests with this court, and on the other hand that this nation's foreign policy compels that Customs detain the property and that this court take custody of the property

in an interpleader. The defendant cannot have it both ways. As is stated in the new Armacost declaration, the chief executive has decided that ownership of the merchandise in question will not be resolved by diplomatic negotiation, but will be determined by the judiciary in accordance with recognized principles of law. That is precisely what this court has attempted to do. To the extent that the executive branch may have promised or guaranteed to the Aquino government that the United States courts would take jurisdiction of the property in an interpleader or reach a particular result in this case, it has strayed outside of its province. If the executive branch has determined to submit the issue to the courts, it must defer to the judicial resolution of the controversy; it may not invoke its foreign policy powers to compel this court to make a favorable decision, while at the same time professing to leave the decision up to the judicial branch.

B. *The Balance of Hardships*

Defendant argues that the balance of hardships tips sharply in its favor because this court's decision has "all but eliminated" the Philippine government's opportunity to pursue its claim for ownership. It claims that this court's order to Customs will allow President Marcos the opportunity to dispose of the merchandise prior to a resolution of the claims to ownership, thus in effect barring Philippine government's claim to recovery of the goods.

While it may be commendable for the defendant to gratuitously advocate the position of the present Philippine government, this argument is tangential to the issue of the balance of hardships between the parties to this case. Even so, the court feels compelled to address the misstatement of the record in the case of *Republic of the Philippines v. Ferdinand E. Marcos, et al.* (Civil No. 36-0213). First, as the court stated in its Decision and

Order, Customs' authority to detain the goods in no way preordains the result in that case. Second, there is no evidence to suggest that the Republic of the Philippines will be precluded from pursuing any of the normal means of discovery or interim relief to prove and secure its claim. Third, in answer to the argument that the Philippine government will be barred from recovering the merchandise itself, it is noteworthy that the Aquino government is seeking the currency, foreign and gold *or its money equivalent* from the defendants. See Complaint, p. 10, ¶ 4. The defendant's claim of irreparable harm to the Philippine government is strongly undermined by the fact it will be satisfied with monetary relief should it prevail. Whatever damage will be sustained by the Republic of the Philippines as a consequence of the plaintiffs' importation of the merchandise can be compensated with money damages.

Defendant also suggests that this country's foreign relations will be damaged if this court's order is implemented. As discussed above, the executive branch apparently made a policy decision to submit the dispute over ownership to the judicial branch. Having deferred its foreign policy authority to resolve the dispute by diplomatic channels in favor of a judicial resolution, it cannot now argue that its standing with the Aquino administration will be damaged because the court did not come to the desired result.

For the foregoing reasons,

IT IS HEREBY ORDERED THAT the Defendant's Motion for Stay Pending Appeal be, and the same is DENIED.

DATED: Honolulu, Hawaii, Jun. 17, 1986

/s/ Harold M. Fong
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 86-0155
Civil No. 86-0213

REPUBLIC OF THE PHILIPPINES by the CENTRAL BANK OF THE PHILIPPINES,
Plaintiff,

vs.

FERDINAND E. MARCOS, *et al.*,
Defendants.

UNITED STATES OF AMERICA,
Counter-Claimant,

vs.

REPUBLIC OF THE PHILIPPINES by the CENTRAL BANK OF THE PHILIPPINES,
Counter-Defendants,

and

FERDINAND E. MARCOS, *et al.*,
Cross-Defendants.

FERDINAND E. MARCOS,
Counter-Claimant,

vs.

REPUBLIC OF THE PHILIPPINES, *et al.*,
Counter-Defendants.

[Filed Oct. 27, 1986]

ORDER GRANTING MOTION TO DISMISS CROSS-CLAIM AND DENYING MOTION FOR INTERPLEADER

Ferdinand E. Marcos' Motion to Dismiss Cross-Claim of the United States, and the United States' Cross-Motion to Grant Interpleader came on for hearing before this court on October 20, 1986. The court, being familiar with the memoranda, the record and the arguments of counsel, finds as follows:

On February 28, 1986 and March 21, 1986, the Republic of the Philippines by the Central Bank of the Philippines filed two separate lawsuits in this district against Ferdinand E. Marcos and others (hereinafter referred to as the Marcos defendants), and two U.S. Customs Officials for the return of currency, gold and jewels. Magistrate Conklin consolidated both cases on September 11, 1986.

On April 9, 1986, the United States of America on behalf of the Customs Officials filed a cross-claim against the Marcos defendants. The cross-claim sought to interplead the currency, gold and jewelry which is the subject of this lawsuit, and which is currently held by the Customs Office.

On August 11, 1986, the Marcos defendants filed the present motion to dismiss the cross-claim of the United States. The United States responded by filing a cross-motion for interpleader pursuant to Fed. R. Civ. P. 22.

Prior to the filing of the present lawsuit, Ramon Azurin and Gregorio Araneta (two individual Marcos defendants) filed an action against William Von Raab in *Azurin v. Von Raab*, Civ. No. 86-189. The court granted

the plaintiffs' Motion for Writ of Mandamus, and ordered the Customs Officials to release the detained merchandise. The order was stayed, pending a decision by the Court of Appeals for the Ninth Circuit.

Fed. R. Civ. P. 22 provides for interpleader. It states in relevant part:

> (1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. . . . A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim.

The purpose of interpleader is to protect the stakeholder, the possessor of the property to which contesting claims are made. The Marcos defendants argue that interpleader is only appropriate where the stakeholder is subject to multiple liability. However, interpleader is appropriate to protect a party from not only multiple liability, but also multiple litigation. *Texas v. Florida*, 306 U.S. 398, 412 (1938). *See also Libby, McNeill, and Libby v. City Nat'l Bank*, 592 F.2d 504 (9th Cir. 1978).

Interpleader is remedial and should be liberally construed. *In the Matter of Bohart*, 743 F.2d 313 (5th Cir. 1984). The United States extends the purpose of interpleader to argue that any review of the merits is inappropriate, or that the mere possibility of even frivolous lawsuits is sufficient to justify interpleader. Although the court will not rule upon the merits of the competing claims, the court is required to determine whether the stakeholder's fear of competing claims is real and substantial. *Texas v. Florida*, 306 U.S. 398 (1938).

The United States argues that it cannot anticipate every argument which a claimant might raise. However, the United States must at least present the possibility of colorable conflicting claims. Any litigant could be

subject to additional lawsuits. However, interpleader is inappropriate where these lawsuits lack any reasonable basis.

Here, the Marcos defendants argue that the United States Government has no reasonable or bona fide fear of multiple liability or vexatious litigation. The United States argues that even if it is not ultimately liable, it will be subjected to multiple and vexatious lawsuits for the goods.

In *Azurin v. Von Raab*, Civ. No. 86-0189 (Decision and Order filed on June 6, 1986), this court ruled "that Customs has no statutory duty or right to detain goods until such time as an importer proves legal ownership of the goods." In fact, the court explicitly rejected the proposition that it take custody of the property in an interpleader. *Id.* (Order Denying Motion for Stay Pending Appeal filed on June 17, 1986). The court, therefore, issued a Writ of Mandamus ordering the U.S. Customs Office to deliver the goods to the Marcos agents.

The United States government concedes that interpleader would be inappropriate if the Writ of Mandamus was enforced. By the terms of the Writ, the Customs Office is required to return the material to the Marcos agents. The United States agrees that the Customs Office cannot be held liable for obeying the orders of the court. *J. Henry Schroder Banking Corp. v. Schultz*, 373 F. Supp. 1283 (S.D. Texas 1974).

Therefore, the United States wishes to avoid multiple liability and vexatious litigation by interpleading the material in question, but does not wish to avoid the same problems by obeying the Writ of Mandamus. It wishes this court to accept constructive possession of the goods, and expresses no opposition if this court should return the material to the Marcos agents in the event *Azurin* is affirmed. The United States merely opposes returning the materials themselves, even under orders of this court.

However, if this court accepted constructive possession, the Customs Office would be dispossessed of control over the material in question, and the Writ of Mandamus becomes moot. Furthermore, an acceptance of constructive possession would be inconsistent with this court's prior holding in *Azurin*. Finally, it is unclear whether the possessory interest of the interpleaded goods could be transferred until the conclusion of the case, even if the Court of Appeals for the Ninth Circuit affirmed *Azurin*. Under questioning by this court, the government merely stated that it would have no interest in the final outcome.

The court further finds that the U.S. Customs Office has no reasonable fear of conflicting liability or multiple lawsuits. The United States can point to only two other claimants to the goods: 1) the Central Bank of the Philippines, and 2) Rogelio D. Roxas.

Both claimants assert an ownership interest in the goods, but do not assert a direct cause of action against the U.S. Customs Service. Even if there are competing claimants to the property, interpleader is inappropriate where the interpleading party has no liability for the surrender of the property. *See Johnson v. United States*, 566 F. Supp. 1012 (M.D. Florida) (interpleader denied where trustees of pension fund are immune from liability for surrender of trust property to I.R.S.). Here, the claimants have stated no cause of action against the Customs Office, only against the Marcos defendants.

With respect to potential liability in an international forum, the court finds the argument without merit. The United States either wishes to remove this case to an international court or it does not. If it does not, the United States may simply refuse to submit itself to the jurisdiction of the international forum, and the international court's decision would be unenforceable in the federal and state courts of the United States.

If the United States wishes to have this issue litigated in international court, interpleader would also be inappropriate. Jurisdiction over property must exist in one court or another, not in both. The United States Government, even after direct questioning by this court, gave no further guidance as to the government's inclination. Under the circumstances of this case, the record is insufficient to justify interpleader on the basis of any potential non-legal, political pressure by a foreign sovereign.

The court recognizes, however, that circumstances may change if the Court of Appeals for the Ninth Circuit vacates the Writ of Mandamus issued in *Azurin v. Von Raab*, Civ. No. 86-0189.

Accordingly, IT IS HEREBY ORDERED that the Marcos Defendants' Motion to Dismiss the Cross-Claim be, and the same is GRANTED. IT IS FURTHER ORDERED that the United States of America's Cross-Motion for Interpleader be, and the same is, DENIED without prejudice.

DATED: Honolulu, Hawaii, Oct. 27, 1986.

/s/ Harold M. Fong
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-2154

RAMON AZURIN, *et al.*,
Plaintiffs-Appellees,

v.

WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS OF THE UNITED STATES CUSTOMS SERVICE,
Defendant-Appellant.

[Filed June 23, 1986]

Appeal from Writ of Mandamus from the United States District Court for the District of Hawaii
Honorable Harold M. Fong, District Judge, Presiding

ORDER

Before: KOELSCH, FERGUSON and REINHARDT, Circuit Judges

This appeal relates to Ferdinand Marcos' effort to obtain the return of property, including jewelry, currency, and negotiable instruments that he brought with him when he arrived in Hawaii from the Philippines. That property is now in the possession of the United States Customs Service. The district court issued a writ of mandamus directing the Commissioner of Customs to release the property in question to Marcos' agents. It explained its reasons in a thorough, detailed, and careful

opinion in which it analyzed and discussed a number of serious, important legal questions. Subsequently, the district court denied a stay of its order. Again it prepared a thorough, detailed, and careful written explanation of its reasons. The Commissioner of Customs appealed from the writ of mandamus and filed an emergency motion seeking a stay of that order.

As we have mentioned, the petition filed by the Commissioner raises a number of serious and complex legal questions. The issues presented on appeal are substantial and of public importance. There is a clear public interest in their proper resolution. In addition, the balance of hardships in this case strongly favors the granting of a stay pending appeal: If a stay is granted, the status quo will be maintained and there will be no danger of dissipation of the assets.

The emergency motion of the Commissioner of Customs for a stay pending appeal is GRANTED. (*See Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197 (9th Cir. 1980); *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir.), *rev'd on other grounds*, 463 U.S. 1328 (1983)).

The appeal is ordered expedited.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-2154

RAMON AZURIN; GREGORIO ARANETA,
Plaintiffs-Appellees,

v.

WILLIAM VON RAAB, in his capacity as Commissioner of Customs of the United States Customs Service,
Defendant-Appellant.

D.C. No. CV-86-189-HMF

Appeal from the United States District Court
for the District of Hawaii

[Filed Jan. 6, 1987]

ORDER

Before: WALLACE, ALARCON, and BEEZER, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-2154

RAMON AZURIN and GREGORIO ARANETA,
Plaintiffs-Appellees,
vs.

WILLIAM VON RAAB, in his capacity as Commissioner of Customs of the United States Customs Service,
Defendant-Appellant.

[Filed Jan. 20, 1987]

Before: WALLACE, ALARCON and BEEZER, Circuit Judges

Appellees' motion to stay issuance of the mandate is granted. Issuance of the mandate is stayed for 30 days from the entry of this order, in accordance with Fed. R. App. P. 41(b).

19 U.S.C. 1490(a):

§ 1490. General orders

(a) Incomplete entry

Whenever entry of any imported merchandise is not made within the time provided by law or the regulations prescribed by the Secretary of the Treasury, or whenever entry of such merchandise is incomplete because of failure to pay the estimated duties, or whenever, in the opinion of the appropriate customs officer, entry of such merchandise can not be made for want of proper documents or other cause, or whenever the appropriate customs officer believes that any merchandise is not correctly and legally invoiced, he shall take the merchandise into his custody and send it to a bonded warehouse or public store, to be held at the risk and expense of the consignee until entry is made or completed and the proper documents are produced, or a bond given for their production.

19 U.S.C. 1484(a)(1):

§ 1484. Entry of merchandise

(a) Requirement and time

(1) Except as provided in sections 1490, 1498, 1552, 1553 and 1336(j) of this title and in subsections (h) and (i) of this section, one of the parties qualifying as "importer of record" under paragraph (2)(C) of this subsection, either in person or by an agent authorized by him in writing—

> (A) shall make entry therefor by filing with the appropriate customs officer such documentation as is necessary to enable such officer to determine whether the merchandise may be released from customs custody; and

(B) shall file (at the time required under paragraph (2)(B) of this subsection) with the appropriate customs officer such other documentation as is necessary to enable such officer to assess properly the duties on the merchandise, collect accurate statistics with respect to the merchandise, and determine whether any other applicable requirement of law (other than a requirement relating to release from customs custody) is met.

* * * *

19 U.S.C. 1484(a)(2)(C):

* * * *

(C) When an entry of merchandise is made under this section, the required documentation shall be filed either by the owner or purchaser of the merchandise or, when appropriately designated by the owner, purchaser, or consignee of the merchandise, a person holding a valid license under section 1641 of this title. When a consignee declares on entry that he is the owner or purchaser of merchandise, the appropriate customs officer may, without liability, accept the declaration. For the purposes of this subtitle, the importer of record must be one of the parties who is eligible to file the documentation required by this section.

* * * *

19 C.F.R. § 141.12:

When merchandise is not imported by a common carrier, possession of the merchandise at the time of arrival in the United States shall be deemed sufficient evidence of the right to make entry.

19 C.F.R. § 101.1(k)(1):

Importer. "Importer" means the person primarily liable for the payment of any duties on the merchandise, or an

authorized agent acting on his behalf. The importer may be:

(1) The consignee, or

(2) The importer of record, or

(3) The actual owner of the merchandise, if an actual owner's declaration and superseding bond has been filed in accordance with § 141.20 of this chapter, or

(4) The transferee of the merchandise, if the right to withdraw merchandise in a bonded warehouse has been transferred in accordance with Subpart C of Part 144 of this chapter.

No. 86-2154

IN THE UNITED STATES COURT OF APPEALS
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Commissioner of Customs of the
United States Customs Service,
Defendant-Appellant.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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No. 86-2154

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAMON AZURIN, *et al.*,
Plaintiffs-Appellees,

v.

WILLIAM VON RAAB,
Commissioner of Customs of the
United States Customs Service,
Defendant-Appellant.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

I. INTRODUCTION

The United States District Court for the District of Hawaii granted petitioners' Ramon Azurin and Gregorio Araneta's application for a writ of mandamus requiring defendant-appellant Commissioner of Customs to release the property declared by petitioners in the appropriate Customs documents on the grounds that, among other things, defendant-appellant was detaining the goods although it disavowed that it was conducting any investigation, forfeiture proceeding or other inquiry regarding the property. In addition, the District Court held an interpleader action was not an available remedy. A panel

of this Court filed an opinion on October 29, 1986 reversing that decision. The panel's opinion appears to have been decided without the benefit of the October 27 decision of the District Court denying defendant-appellant the right to interplead the property.[1]

II. BACKGROUND OF APPEAL

On February 25, 1986, representatives of the United States military transported in U.S. military aircraft Ferdinand E. Marcos, President of the Republic of the Philippines, members of his entourage, including petitioners, and, in a separate plane, the property at issue in this litigation, to Guam. The property included 22 crates of Philippines currency valued at over $1 million and jewelry valued by the Customs Service at over $4 million. After a brief layover in Guam, the U.S. military flew the same persons and property to Hawaii.

On February 26, the day that President Marcos and his party arrived in Hawaii, President Reagan issued a directive stating that he had designated President Marcos as a "distinguished foreign visitor", and also ordered secret service protection for him pursuant to 18 U.S.C. § 3056(a). That same day, the United States Customs Service examined property aboard a second military transport plane that arrived in Hawaii immediately after the one that carried President Marcos and his party.

Several days later, the Customs Service commenced a formal inspection of the property brought into the United States. In response to request by the Customs Service, petitioner Gregorio Araneta submitted on March 7 a completed Form 7501 and Entry Summary for specific property as attorney-in-fact for President Marcos, and petitioner Ramon Azurin, also acting on behalf of Presi-

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[1] By letter dated October 29, 1986, copies of the District Court's order denying appellant the right to interplead were forwarded to the Court. A copy of the opinion is annexed hereto.

dent Marcos, submitted on March 10 a completed Form 4790, Report of International Transportation of Currency or Monitary Instruments. The Customs Service accepted both of those documents without objection.

The Customs Service completed its examination of the property in question on March 11, 1986; nevertheless, it refused petitioner's request to deliver the property to their possession because of adverse claims of ownership by the Philippines.

On February 28, 1986, the Republic of the Philippines, through the Central Bank of the Philippines, filed an action in the District Court in Hawaii for forfeiture of the currency or an award for its monetary equivalent based on alleged violations of Philippine currency regulations. Several weeks later, the Philippines filed a second suit again seeking forfeiture of the currency as well as all jewelry containing gold. In the first action, the Republic of the Philippines alleged that the currency in the crates is the "lawful property of plaintiff and its agencies and instrumentalities" and that it was "wrongfully and illegally misappropriated and taken by the Marcos defendants and their agents." The second action did *not* allege that the currency and property bearing gold is the "lawful property" of plaintiff, but stated merely that the currency and property bearing gold was exported from the Philippines without authorization, and was not declared or presented to Philippine Customs for inspection as required by Philippine law. Plaintiff sought relief forfeiting the currency and gold pursuant to the Philippine's customs and currency laws, or damages for its monetary equivalent.[2] Both lawsuits were brought

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[2] On October 22, 1986, the Republic of the Philippines amended both of the complaints eliminating any and all mention of "the Republic of the Philippines" in the complaint; making the nominal plaintiff the "Central Bank of the Philippines"; stripping the complaint of any allegations that the Republic of the Philippines or the

against each individual who arrived with President Marcos from the Philippines, and, in addition, the United States of America and individual federal customs officers.

At the hearing on March 7, 1986 involving the two currency cases, President Marcos sought to prevent the release of the Customs Service inventory of the money and property to the Philippine government, on the basis that disclosure under the Freedom of Information Act was improper because the detention of the goods was, in fact, a seizure, part of an investigation or other pending case within the meaning of 19 C.F.R. § 103.12. Counsel for Customs Service represented to the Court, and Customs has consistently maintained ever since, that there was no seizure and that there is no investigation or pending criminal case.[3] The District Court accepted this representation and ordered the inventory disclosed.

Central Bank owns the property which is the subject of the suits; stripping the complaint of any allegations that the defendants "wrongfully took or misappropriated" the property; and specifically limiting the complaint solely to an action for forfeiture of the property to plaintiff pursuant to the Philippine export and currency laws. Thus, there is presently no formal claim of ownership to the property on behalf of the Republic of the Philippines or the Central Bank of the Philippines pending in the District of Hawaii, the situs of the property.

On or about June 8, 1986, the Government of the Philippines filed a RICO action in the Central District of California and obtained a preliminary injunction to freeze the movement of assets belonging to President Marcos including, but not limited to, the property in the custody of the Customs Service. Appeal from that preliminary injunction has been briefed and argued and is pending decision in this Court in No. 86-6091. The allegations in that complaint specifically allege that the property, which is the subject of this appeal, was stolen or taken by fraud from the Philippines.

[3] Petitioners designated for the record on this appeal the transcripts of the hearings containing these representations, and others as well, but question whether, in light of the panel's decision, those transcripts were ever transmitted to the panel. *See* letter of counterdesignation of record dated July 3, 1986.

On March 13, 1986, petitioners filed this action with the District Court seeking a writ of mandamus to compel Customs to release the detained property to petitioner's possession. The District Court ruled that the Customs Service did not have the authority to detain the property under Title 19 of the U.S. Code or under the Executive Branch's power to manage foreign relations. The District Court rejected defendant's contention that he enjoys the discretion "to detain goods until such time as an importer proves legal ownership of the goods." Further, the District Court pointed out that the conflicting signals emanating from the Executive Branch, as reflected by President Reagan's designation of President Marcos as a "distinguished foreign visitor," refute defendant's assertion that the position of the United States on the issue of the claim to the Philippines to the property was clearly established. The District Court denied Customs' application for a stay of the writ of mandamus pending appeal. This Court, however, entered a stay of the writ of mandamus pending this appeal.

In its opinion, the panel of this Court (Judges Wallace, Alarcon and Beezer) reversed the District Court's order granting the writ of mandamus purely on the ground that petitioners had failed to show that defendant's duty to release the goods is "ministerial" and "so plainly prescribed as to be free from doubt." In the panel's view, the Customs regulations, even in the context of this case, do not impose such a "clear" duty to release the goods notwithstanding the absence of any seizure, forfeiture or other investigation. The panel took care to emphasize the narrowness of its holding, stating that it did not reach the issues of whether the remaining elements of mandamus were met, nor did it reach the issue of whether Customs has discretion to inject foreign policy considerations into execution of its statutory duties. Its holding appears to turn wholly on the use of the word "may" in the Customs statutes, 19 U.S.C. § 1484

(a) (2) (C), accepting the argument that Customs thereby has discretion to detain goods in order to consider who is the legal owner, notwithstanding its regular practice to deliver imported goods to one who has the right to immediate possession and who otherwise has paid appropriate duties and executed necessary documents.

III. SUMMARY OF GROUNDS FOR REHEARING

The grounds for rehearing this appeal are as follows:

1. The panel failed to consider the material fact that the Government's motion to interplead the property in question had been dismissed by Judge Fong one or two days before publication of the appellate opinion in this case.

2. The panel overlooked the material fact that the Customs Service had the ability under its existing regulatory framework to detain goods and that the Customs Service specifically stated that these means of detention, namely investigation, forfeiture or other pending cases, were not being implemented in this case.

3. The panel overlooked the material fact that the President of the United States by virtue of his power over his cabinet officers and their departments was properly the party designating President Marcos as a "distinguished foreign visitor" thereby entitling him to the privileges set forth in 19 C.F.R. § 148.82(b) (4) (1985).

4. The panel has wrongly distinguished *Fonseca v. Regan* by implying a material fact that Fonseca, unlike President Marcos, never intended to enter his property into the United States; whereas the record establishes quite the contrary presumption and the District Court knew not only from this record but from the other cases before him that President Marcos had no intention of leaving the Philippines to go into the United States.

IV. ARGUMENT

A. JUDGE FONG'S DENIAL OF THE GOVERNMENT'S MOTION TO INTERPLEAD THE PROPERTY

Before this Court and the District Court, appellant has argued that the sole purpose, indeed the only purpose, for detaining the property in question was to place the property into interpleader. Two days before the decision by the panel in this case was filed, however, the District Court for the District of Hawaii ruled that interpleader was not an available remedy to the United States Customs Service to determine ownership of the goods in question. The Court denied the government's motion for interpleader and granted Ferdinand Marcos' motion to dismiss U.S. Customs' cross-claim for interpleader in the Republic of the Philippines actions. Absent the interpleader remedy, appellant has no legitimate justification for detaining the property. The *entire* legal basis—stated in papers before this Court and the District Court as well as in official statements—for the continued detention by the United States Customs Service of this property, has therefore evaporated.

The panel, however, saw fit to decide this appeal without the benefit of Judge Fong's decision, holding that the interpleader action is "still pending before the Hawaiian District Court," and therefore is "not ripe for appellate review." Slip op. at 12. Petitioners submit that as a result of the District Court's decision, their argument that Customs has an affirmative ministerial duty to release the goods is no longer open to question.

B. CUSTOMS HAS SPECIFICALLY STATED THAT IT WAS NOT DETAINING THE PROPERTY HERE BECAUSE OF ANY INVESTIGATION, FORFEITURE OR OTHER PENDING CASE BEFORE THE CUSTOMS SERVICE

While appellees are prevented by the applicable rules from rearguing the case, appellees contend that the

panel's analysis of the laws and regulations has overlooked the seminal fact that Customs has from the outset maintained that it was not detaining the property here because of any investigation, forfeiture or other pending case before it.

This fact is critical because it is by investigation, forfeiture or other pending case that Customs has traditionally detained goods. *See, e.g., United States v. Garber*, 626 F.2d 1144 (3d Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981). The uniqueness of the facts of this case need not have caused an extraordinary interpretation of the powers of the Customs Service—an interpretation which invites exceptions to well-established rules and policies regarding the entry and importation of goods into the United States. While appellees have always contended that rights to possession of the goods and *not* ownership *per se* is the critical determinant of the rights of competing claimants, whether it is possession or ownership is in fact irrelevant here where Customs has specifically abjured from utilizing the very procedures available to it by which it would make any determination at all of the rights of competing claimants. Thus, the critical fact of this non-invocation of administrative authority should not have been overlooked.

C. PRESIDENT REAGAN DESIGNATED PRESIDENT MARCOS A DISTINGUISHED FOREIGN VISITOR

The panel overlooked the material fact of the power of the President of the United States over all departments and agencies of the Executive Branch of the government. Accordingly, the panel's statement that the Department of State did not designate President Marcos to be a distinguished foreign visitor does not end the matter when it is President Reagan who did make the designation.

One certain reality which flowed from this designation—and concededly it is not in the record of this case

unless it is presumed that the President's direction was carried out—is that President Marcos did enjoy Secret Service protection for 30 days after he arrived in the United States. The letter of designation, therefore, overlooked the fact of the President's action and, of course, that nothing in the letter limited the designation to exclude President Marcos' enjoyment of benefits of the exemption from duty and entry of the property pursuant to 19 C.F.R. § 148.82(b)(4).

D. PRESIDENT MARCOS, LIKE MR. FONSECA, DID NOT INTEND TO ENTER HIS PROPERTY INTO THE UNITED STATES BECAUSE HE NEVER INTENDED TO COME HERE TO BEGIN WITH

The panel implies a fact not justified in the record *viz.*, that President Marcos intended to come to the United States and to enter with the property in question. This implication flows from the panel's distinguishing of *Fonseca v. Regan* when it observed on page 11 of its opinion that "Fonseca never intended to enter the lost baggage into the United States."

The panel has overlooked the fact that, on the record of this case, at a minimum, it could not be presumed that President Marcos intended to come to this country on February 25, 1986. In Mr. Logan's deposition, which is part of the record in this case, he stated that he knew at the time of these events that President Marcos had contended that he had been brought to the United States against his wishes. Deposition of William Logan at p. 51, lines 7-15.

Thus, by overlooking this material fact, *Fonseca* was incorrectly distinguished from the case at bar. Indeed, *Fonseca* is virtually indistinguishable from the facts in this case. To rule otherwise is to fail to consider that critical fact.

E. CONFLICT WITH *FONSECA*

If the Court addresses the factual distinction cited in this brief and concludes nevertheless that *Fonseca* is inapplicable, appellees suggest, albeit perhaps prematurely, that such a ruling might place the court's opinion here in conflict with *Fonseca* as that case in fact and in principle is almost identical with the matter before this Court.

V. CONCLUSION

Rehearing or rehearing *en banc* is justified in this case because certain material facts have been overlooked which, when addressed, should change the outcome of this appeal. Appellees respectfully request that their prayer for relief be granted.

Respectfully submitted,

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